IN THE

Supreme Court of the United States

October Term, 1965

No. 3

WILLIAM ALBERTSON and ROSCOE QUINCY PROCTOR,

Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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Opinion Below

The opinion of the Court of Appeals (R. 62) is reported at 332 F. 2d 317.

Jurisdiction

The judgment below (R. 74) was entered on April 23, 1964. The petition for certiorari was filed on July 10, 1964, and was granted on May 17, 1965 (R. 75). The jurisdiction of this Court is conferred by section 14(a) of the Subversive Activities Control Act, 64 Stat. 1001, 50 U. S. C. 793, and 28 U. S. C. 1254.

Statute and Regulations Involved

The pertinent provisions of the Subversive Activities Control Act and the regulations and registration forms prescribed by the Attorney General are set forth in Appendix A, *infra*.

Questions Presented

The judgment below affirmed orders of the Subversive Activities Control Board (herein called the Board) requiring petitioners to register with the Attorney General pursuant to section 8 of the Subversive Activities Control Act (herein called the Act) as members of "the Communist Party of the United States of America, a Communist-action organization." The questions presented are:

1. Whether the court below erred in refusing to adjudicate petitioner's claims that they are protected by the privilege against self-incrimination from being compelled to register pursuant to section 8 of the Act.

2. Whether the member registration requirements of the Act and the Board's registration orders violate the privilege of petitioners against self-incrimination.

3. Whether the member registration requirements of the Act, on their face and as applied, violate due process and the First Amendment because they serve no governmental purpose, are irrational, compel self-defamation, and abridge freedom of belief, conscience and association.

4. Whether the member registration requirements of the Act, on their face and as applied, violate due process and the prohibition against bills of attainder because they apply to persons whose membership has been terminated and because they make the Board's 1953 determination that the Communist Party was a Communist-action organization conclusive as to the present character of the Communist Party.

5. Whether the member registration requirements of the Act unconstitutionally deny petitioners the safeguards of indictment by grand jury, trial by jury and judicial trial because they make the findings of the Board that petitioners were members of the Communist Party and that the latter was a Communist-action organization conclusive upon petitioners in prosecutions for their failure to register.

Statement of the Case

This case brings to the Court for the first time the constitutionality of the provisions of the Act requiring self-registration of persons found to be members of a Communist-action organization.

The Act

The Act defines a Communist-action organization as one which is directed, dominated or controlled by the foreign government controlling the world Communist movement and which operates to advance the objectives of that movement (sec. 3(3)). The Act finds that there exists a world Communist movement, controlled by the Communist dictatorship of an unnamed foreign country, which seeks by criminal and other means to overthrow existing governments and establish in all countries Communist totalitarian dictatorships subservient to the controlling foreign dictatorship (sec. 2).

The Act authorizes proceedings before the Board, on petition of the Attorney General, for a determination that an accused organization is a Communist-action organization and for an order requiring it to register as such with the Attorney General (secs. 7, 13). An organization which is ordered to register must accompany its registration with a registration statement containing, among other things, a list of its members (sec. 7(d)).

Section 8 of the Act provides that if an organization fails to register within thirty days after an order that it

do so becomes final,[1] the individual members shall register as such with the Attorney General. Members incur no penalties for failing to register at this point. However, section 13 authorizes the Board, on petition of the Attorney General, to find that an accused individual is a member and to order him to register under section 8. An individual who fails to register in obedience to a final order of the Board is punishable by imprisonment for five years and a fine of $10,000, both cumulative for each day that the failure continues (sec. 15(a)).

The registration of an individual must be accompanied by a registration statement containing such information as the Attorney General may prescribe (sec. 8(c)). All registration statements are open to public inspection (sec. 9). Failure to file the statement is punishable by imprisonment for five years and a $10,000 fine (sec. 15(a)).

Regulations of the Attorney General provide that the registration of an individual shall be accomplished by signing and filing a form (Form IS-52a) stating that the registrant "hereby registers as a member of , a Communist-action organization." The registration statement prescribed by the regulations consists of a separate form (Form IS-52) calling for the registrant's name, all other names used by him during the past ten years, the date and place of his birth, the name of the Communist-action organization of which he is a member, and a list and description of the duties of all offices in the organization held by him during the preceding year. See Appendix A, *infra*, for these regulations and forms.

The Communist Party Case.

On November 22, 1950, the Attorney General petitioned the Board for an order requiring the Communist Party to

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[1] Board orders become final on the exhaustion of judicial review (sec. 14(c)).

register under section 7 as a Communist-action organization. After an administrative hearing, the Board issued the desired order on April 20, 1953. In its accompanying Report, the Board found that the unnamed foreign government referred to in sections 2 and 3(3) of the Act was the Soviet Union. After extensive litigation, the order was eventually sustained in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (hereafter called the *Communist Party* case),[2] but with various questions reserved, including whether the order can constitutionally be enforced. The order became final on October 20, 1961.[3] The Communist Party has not registered in compliance with the order, and has twice been indicted for its failure to do so. In the criminal proceedings, which are still pending, the Party maintains that the registration order cannot constitutionally be enforced against it.[4]

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[2] The history of the litigation is summarized in the *Communist Party* case at 19-22.

[3] Under section 14(b) of the Act, the order became final ten days after issuance of the Court's mandate. The mandate issued on October 10, 1961, following denial of a petition for rehearing. 368 U. S. 871.

[4] In December, 1962, the Communist Party was convicted in the District of Columbia on an indictment, returned a year earlier, charging failure to register on each of eleven days in 1961 and to file a registration statement. The Court of Appeals reversed the conviction with instructions to enter a judgment of acquittal unless the government requested a new trial where it could attempt to meet its burden of proving the availability of someone who was willing to sign and submit the registration documents on behalf of the Party. *Communist Party* v. *United States*, 331 F. 2d 807, cert. den. sub nom. *United States* v. *Communist Party*, 377 U. S. 968. In December, 1964, the government moved in the District Court for a new trial which was scheduled for March, 1965. On February 25, 1965, a second indictment was returned charging the Party with failure to register on each of eleven days in 1965 and to file a registration statement (Cr. No. 202-65, D. C. Dist. Col.). On motion of the government, and over the defendant's opposition, the two indictments were consolidated for trial, and the trial was postponed until October, 1965.

The proceedings against petitioners.

On May 31, 1962, the Attorney General instituted a separate Board proceeding against each petitioner for an order requiring him to register as a member of the Communist Party. The petitions of the Attorney General alleged that the Communist Party had not complied with the final registration order against it, that petitioners were members of the Communist Party, and that they had not registered as such (R. 2, 30).

Each petitioner filed a sworn answer in which he alleged that sections 8 and 13 of the Act, on their face and as sought to be applied, violate his privilege against self-incrimination, which he thereby asserted. The answers also denied that the Communist Party is a Communist-action organization and declined, in reliance on petitioners' constitutional privilege, to answer the allegations of the petitions that they were members of the Communist Party (R. 5, 33).[5]

At the hearings,[6] the Board took official notice of the proceedings which culminated in the final registration order against the Communist Party. It was stipulated that the Communist Party had not registered under the Act and that petitioners had not registered as members of the Communist Party (R. 13-16, 41-43, 53-54).

The Attorney General's evidence consisted of the testimony of paid F. B. I. informers that petitioners had participated in meetings of the Communist Party and had been elected to Party offices (R. 10-11, 16-24, 38-39, 44-49). Petitioners offered no evidence (R. 8, 37).

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[5] Under the Board's regulations, these claims of privilege operated as denials of the allegations to which they were addressed (R. 8, 36).

[6] The Board conducted separate proceedings for each petitioner. However, there is no material difference between them. Albertson's hearing was held before the Board in September, 1962 (R. 8). Proctor's hearing was held before a Board member in November, 1962 (R. 37).

The Board issued reports and orders finding each petitioner to be, and ordering him to register as, "a member of the Communist Party of the United States of America, a Communist-action organization" (R. 25-26, 57-58). The order against Albertson was issued on October 29, 1962 (R. 26) and that against Proctor on January 18, 1963 (R. 58).

No evidence was adduced at the hearings, and the Board made no findings, that petitioners had engaged in unlawful conduct, had advocated the violent overthrow of the government even as a matter of abstract doctrine, or had knowledge of such conduct or advocacy by the Party. There was no evidence, and the Board made no findings, that petitioners know or believe that the Party is or has any of the characteristics of a Communist-action organization. The Board held that petitioners were bound in the proceedings against them by the Board's 1953 determination that the Communist Party was a Communist-action organization (R. 13-14, 53-54).

In their petitions for review by the court below, petitioners again claimed the privilege against self-incrimination (R. 28, 60) which they had earlier asserted in their answers.[7]

The court below affirmed the Board's orders. It held (R. 69) that adjudication of the privilege issue must await prosecution of petitioners for non-compliance with the registration orders, and that consideration of the remaining constitutional issues[8] was either likewise premature or

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[7] The Board has issued reports and registration orders like those involving petitioners against 34 other persons (and against another who has died), all of whom similarly claimed their constitutional privilege. These cases are pending in the court below where they are being held on stipulations to abide the result in this case and to be disposed of in accordance with the judgment that is ultimately entered herein. Seven similar cases are pending at the Board level.

[8] Petitioners abandoned the non-constitutional issues raised in their petitions for review (R. 28, 60).

was foreclosed by this Court's decision in the *Communist Party* case.

In response to the petition for certiorari, the government filed a suggestion stating that petitioner Albertson had been expelled from the Communist Party after issuance of the registration order against him and that his case is moot. No action was taken on the suggestion when certiorari was granted. Counsel are authorized to state that it remains petitioner Albertson's position, for the reasons given in his opposition to the government's suggestion, that the cause is not moot as to him and hence should be disposed of in like manner with respect to both petitioners.

Summary of Argument

I.

A. Petitioners' claims of their constitutional privilege against being compelled to register under the Act require adjudication in this proceeding.

The claims of privilege were made in petitioners' answers in the Board proceeding and were reiterated in their petitions for review in the court below. The claims were rejected by the Attorney General in continuing to prosecute the administrative proceeding and by the Board in issuing the registration orders. They were again rejected in the Board's brief in the court below, not as inadequate or premature but as lacking in constitutional merit.

If the Board orders become final, petitioners will immediately be subject to severe cumulative penalties for failure to register. Accordingly, this proceeding affords them the last opportunity to vindicate their constitutional protection against compulsory self-incrimination.

The court below held that, under the *Communist Party* case, adjudication of petitioners' constitutional claim must

await their prosecution for violating the registration orders. However, analysis of that decision shows that none of the factors which led the Court to decline adjudication of the privilege of the officers of the Communist Party is present in this proceeding.

The privilege issue is not premature because of the remote possibility that the Attorney General might change his mind and honor petitioners' claims of privilege. If that were a reason for judicial abstention, jurisdiction would never exist to enjoin enforcement of an unconstitutional statute.

Nor is the issue premature because, as the government argues, petitioners may "choose" to register if the registration orders are affirmed. Registration after affirmance of the orders can no longer be a matter of free choice, since petitioners will be under the compulsion of threatened intolerable punishment. It is such compulsion that the Fifth Amendment prohibits.

The decision below conflicts with the rule of *Ex Parte Young* that where disobedience of an administrative order is punishable by severe cumulative penalties, due process requires the availability of a civil remedy to test the constitutionality of the order.

Finally, further delay in adjudicating the privilege issue is unreasonable and unfair, especially because it is intimately related to First Amendment freedoms.

B. The Act, the registration orders and the registration documents require petitioners to admit membership in the Communist Party. The admissions are incriminating under the Smith Act, section 4(a) of the Act and state statutes and are also within the protection of the privilege because they expose petitioners to forfeitures.

The registration documents require other incriminating admissions, including the admission that the Communist

Party is a Communist-action organization and a listing of aliases, offices held in the Communist Party and identifying information.

C. Section 4(f) does not supplant the privilege.

The first sentence of the section merely gives immunity from prosecution for membership in the Communist Party *per se* but not for offenses in which membership is but one of several ingredients.

The second sentence bars evidentiary use against a registrant of the fact of his registration as a member but does not bar his prosecution for offenses related to his membership. Under *Counselman* v. *Hitchcock,* only such absolute immunity can supplant the privilege.

The rule of *Counselman* is not inapplicable because, as the Board proceedings demonstrated, the Attorney General had reason to believe that petitioners were members of the Communist Party. *Counselman* admits of no exception for cases in which the government is already in possession of the incriminating information the disclosure of which it seeks to compel. Such an exception would serve no purpose, since it permits an incriminating admission to be compelled only if useless—*i.e.,* if it cannot be introduced in evidence and provides the prosecutor with no leads he does not already have.

The argument that an incriminating admission may be extorted on condition that it is valueless is reminiscent of the discredited proposition that the admission in evidence of a coerced confession does not vitiate a conviction where other proof of guilt made use of the confession superfluous. Furthermore, the argument proves too much since it would cover *every* case in which the privilege is invoked. This is so because, even in the absence of a statute of the 4(f) type, the Fifth Amendment prohibits the evidentiary use against a person of an incriminating admission which he was compelled to make after claiming his privilege. Yet,

it has never been considered relevant to the validity of a claim of privilege that the government already had the information it sought to elicit from the witness. And it has made no difference in this respect that the privilege was claimed in a proceeding to which a statute of the 4(f) type was applicable.

Murphy v. *Waterfront Commission* has not modified the rule that Congress cannot supplant the privilege by anything less than a grant of absolute immunity.

The contention that section 4(f) supplants the privilege erroneously assumes that 4(f) prohibits the evidentiary use of the fact of a person's registration as a Communist Party member in *any* criminal proceeding against him. Both the text and the legislative history of the section show that 4(f) does not apply in prosecutions for violating the employment and labeling provisions of sections 5 and 10 of the Act. Moreover, it does not apply to forfeitures. Finally, the section does not bar the evidentiary use against a registrant of the incriminating admissions required by the registration documents in addition to the admission of Party membership.

II.

The *Communist Party* case sustained the Act's requirement that a Communist-action organization furnish the Attorney General a list of its members on the ground that such compulsory disclosure is a reasonable security measure. But where, as here, the Board has already found individuals to be Party members, the requirement that they register as such serves no disclosure function. Nor does it serve any other governmental purpose. It is therefore an arbitrary exertion of governmental power prohibited by due process.

The 8(c) requirement that registrants file a registration statement falls with 8(a), on which it depends. Moreover, since the information to be supplied under 8(c) is

not defined by the Act, the section serves no legitimate governmental purpose, and is invalid as an excessive delegation of legislative power and as authorizing an exploratory search.

The member registration requirement compels a person to register as a member even though his membership has terminated by the time the order that he register becomes final. Thus, it is not a regulation of future membership in a Communist-action organization but an inescapable punishment for past membership. Hence, it is a bill of attainder.

III.

The Act and the registration orders, by exacting declarations from petitioners, violate the First Amendment in two respects.

A. At a minimum, the First Amendment demands some valid governmental reason for ordering a person to make a prescribed declaration or lose his liberty. The requirement that persons found by the Board to be members of the Communist Party declare themselves to be such serves no governmental purpose and would therefore violate the First Amendment even if the declaration were innocuous.

The declaration exacted by a registration order is far from innocuous. It signifies acceptance of repugnant political beliefs and entails self-defamation and foreswearing.

B. The First Amendment invalidates restraints on membership in the Communist Party which are not necessary to prevent a substantive evil within the competence of Congress. The member registration requirement imposes a restraint on membership in the Communist Party without regard to the knowledge or intent of the member or the nature of his activity in the organization. Accordingly, the requirement violates the First Amendment by abridging the freedom of association of "the member for

whom the organization is a vehicle for the advancement of legitimate aims and policies." Moreover, the abridgment serves no governmental interest.

IV.

The Board ruled that petitioners were concluded by the Board's prior determination in the proceeding against the Communist Party that the latter was a Communist-action organization. The ruling violates procedural due process and the prohibition against a bill of attainder in two respects.

A. The ruling bound petitioners by the Board's evidentiary findings, made in a proceeding to which they were not parties, of the nature and control of the Communist Party. This procedure violates the due process principle that persons may not be deprived of liberty without a hearing and opportunity to contest the factual premise on which the validity of the deprivation depends.

This due process defect is aggravated by the fact that the determination of the Board which concluded petitioners was made in 1953. A conclusive presumption that a state of facts, once found to exist, will continue in perpetuity is plainly arbitrary. Yet the Act does not permit petitioners or the Communist Party to secure an adjudication of the current validity of the 1953 determination.

The Board's orders not only violate procedural due process but constitute bills of attainder. In the words of the *Communist Party* case, they attach "to the past and ineradicable actions of an organization" and are not "made to turn on continuously contemporaneous fact."

B. The Board also ruled that petitioners are bound by its decision in the Party proceeding that the Soviet Union was the foreign power, referred to in section 2, which controls a monolithic world Communist movement. In the *Party* case, the Court held that in the event of changed

circumstances the Board or a reviewing court could conclude that the world Communist movement described in section 2 no longer exists. It was only because of this power to construe section 2 in the light of contemporary fact that the Act was held not to offend due process.

It is recognized today that the section 2 description of Communism as a monolithic movement under iron Soviet control is anachronistic. By foreclosing consideration of this fact, the Board's ruling makes the Act violative of due process and a bill of attainder.

V.

The Act makes the Board's findings that petitioners are members of the Communist Party and that the latter is a Communist-action organization conclusive in prosecutions of petitioners for failing to register in obedience to the Board's orders. Thus, determination of the facts which are constitutionally prerequisite to the punishment of petitioners for failure to register is severed from the criminal proceeding and made administratively. Moreover, the determination is made on the basis of a mere preponderance of the evidence.

In these respects, the Act violates the constitutional guarantees of indictment by grand jury, judicial trial and trial by jury. Under *Ex Parte Young*, petitioners may not be required to incur the enormous criminal penalties of the Act as the price of securing an adjudication of this constitutional objection, and are entitled to have it determined in this proceeding.

ARGUMENT

I.

The Act and the registration orders violate petitioners' privilege against self-incrimination.

A. Petitioners' claims of the privilege require adjudication in this proceeding.

The court below refused to decide petitioners' contention that the registration orders compel self-incrimination, holding that adjudication of petitioners' claims of privilege must await their prosecution for violating the registration orders (R. 66-69). The holding is erroneous.

Each petitioner has twice asserted his constitutional privilege against being compelled, by a Board order, to register pursuant to section 8 of the Act. He first claimed the privilege in his sworn answer to the Attorney General's petition (R. 5, 33). The Attorney General rejected the claim by continuing to prosecute the petition, and the Board rejected it by conducting the proceeding and issuing the registration orders. Petitioners' claims of the privilege were reiterated in their petitions for review in the court below (R. 28, 60), and were again rejected by the Board and its Attorney, the Attorney General, not as inadequate or premature, but as lacking in constitutional merit. See Brief for Respondent in the court below, pp. 13-20.

In the event that the orders of the Board become final, petitioners will immediately be subject to cumulative penalties of imprisonment for 5 years and fines of $10,000 for *each day* that they fail to register (sec. 15(a)). If the validity of their claims of privilege is not adjudicated in this proceeding, the threat of these sentences will subject petitioners to the strongest sort of compulsion to register. Yet the Fifth Amendment not only protects persons from punishment for refusing to incriminate themselves but pro-

hibits *compelling* self-incrimination. Accordingly, if petitioners are correct in believing that self-registration under the Act entails self-incrimination, this proceeding affords them the last opportunity to vindicate their constitutional claim to protection against compulsion.

The government conceded in the court below "that the privilege issue is not premature in this proceeding" (Brief for Respondent, p. 15, n. 9), and the opinion below characterized petitioners' contention as "not without force" (R. 66). The court nevertheless held, without mentioning the government's concession, that the issue was premature. This was said to be required by this Court's decision in the *Communist Party* case (R. 66-69).

In that case, a bare majority of the Court (at 106-107) held it premature, on review of the registration order against the Party, to decide whether the registration requirement violated the privilege of the Party officers who were obliged to execute the registration documents. The dissenting Justices believed (at 175-202) that the issue was not premature and that the Act and the Board's order were invalid because they conflicted with the privilege of the officers.

We believe that the majority in the Communist Party case was wrong. In any event, the decision is inapplicable.

The primary grounds for the holding in the *Communist Party* case were that no claim of privilege had as yet been made by the officers or acted upon by the Attorney General. The opinion stated (at 107):

> "The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. . . . We cannot know now that the Party's officers will ever claim the privilege . . . Within thirty days after the Board's registration order becomes final, the Party's officers may file signed registration statements in

> the form required by Form ISA-1. Or they may file statements claiming the privilege in lieu of furnishing the required information. If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions."

Moreover, the Court believed (at 109-10) that the privilege issue as then presented was clouded by unresolved questions as to whether the officers would, or could, assert their privilege "in some form in which it could be recognized" (and see pp. 195-98, dissenting opinion of Justice Brennan). Additionally, the Court apparently was of the opinion that the Party's demand for adjudication of the privilege issue was weakened by considerations of standing arising from the fact that the officers for whose benefit the privilege was invoked were not themselves parties to the proceeding (see pp. 184-85, 193-94, dissenting opinions of Justices Douglas and Brennan).

None of the factors which led the Court to decline adjudication of the privilege of the Party's officers is present here. Petitioners have personally claimed their privilege and their claims have been rejected by the Attorney General and the Board (*supra*, p. 15). No contention has been or could be made that these claims were not in a form which could have been recognized and granted.

Here, therefore, the assertion of the privilege and the refusal to allow it are not matters of conjecture. They are acts which have already taken place and which, therefore, can be adjudged without resort to supposition. Here also, in contrast to the *Communist Party* case, the persons who invoked the privilege are themselves parties to the litigation so that no question of standing can arise.

The court below was plainly wrong in stating (R. 68) that "these circumstances were, of course, all present in

the record before the Supreme Court in the *Communist Party* review proceeding." On the contrary, it was the absence of these circumstances that controlled the Court's decision on prematurity.

The court below envisaged the possibility that, after affirmance of the registration orders, the Attorney General might change his mind as to the validity of petitioners' claims of privilege and honor them (R. 68-69). The court itself recognized that this eventuality was highly improbable (R. 68) as it obviously is in the light of the continuing prosecution of the Communist Party for failure to register (*supra*, p. 5, n. 4) [9] and the government's insistence, in the court below and here, that petitioners' claims of privilege are without merit (Brief for the Respondent in the court below, pp. 13-20; Brief for the Respondent in Opposition with Regard to Petitioner Proctor, pp. 6-7). If the remote possibility of a change of heart by the Attorney General were a sound reason for judicial abstention, the threat of a government official to enforce an allegedly unconstitutional statute would never give a court jurisdiction of a suit to enjoin him. Moreover, the existence of such a bare possibility in the present case is outweighed by the fact that refusal to adjudicate petitioners' claims in this proceeding will require them to risk life sentences if they are to secure a determination of their constitutional rights.

The government argues (Brief for Respondent in Opposition with Regard to Petitioner Proctor, p. 4) that the privilege issue is premature because, if the registration orders are affirmed, petitioners "may . . . choose to reg-

[9] In addition to the indictments against the Party, two of its alleged officers have been indicted for failing to register it in violation of section 7(h) of the Act. *United States* v. *Hall*, D. C. D. C., Criminal No. 228-62, and *United States* v. *Davis*, D. C. D. C., Criminal No. 229-62. The latter indictment was dismissed upon the death of the defendant. Trial of the Hall indictment is awaiting disposition of the case against the Party.

ister." The argument is specious. Registration after affirmance of the orders can no longer be a free choice since petitioners will be under the compulsion of threatened intolerable punishment.[10] As the history of the constitutional privilege and the literal meaning of its text establish, it was precisely this kind of compulsion that the Fifth Amendment was designed to prohibit. Hence, if petitioners' claims are valid, the effect of withholding adjudication is simply to force them to surrender the protection that the Amendment accords.

Postponing adjudication of petitioners' claims of privilege until their prosecution for failure to register also violates the principle that where disobedience of an administrative order is punishable by severe cumulative criminal penalties, due process requires the availability of a civil remedy to test the constitutionality of the order. *Ex Parte Young,* 209 U. S. 123; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331. Cf. *Reisman* v. *Caplin,* 375 U. S. 440, 446-49.[11] Accordingly, in these circumstances the Court has accorded a remedy, when no other was available, by assuming jurisdiction of a proceeding to enjoin enforcement of the statute. Here it is unnecessary to go so far since this statutory review proceeding serves the same purpose.

The court below was therefore mistaken in stating (R. 69) that criminal prosecutions of petitioners for violating the registration orders "will provide an adequate forum for litigation of [the privilege] issue." On the contrary,

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[10] Nor does the Act permit a person to escape compulsion to register by resigning from the Party. For once a registration order becomes final, it must be complied with even though the person against whom it was issued has ceased to be a member. See *infra,* p. 35.

[11] As stated in *Ex Parte Young,* at 147, "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

it is only the present proceeding that provides the forum to which *Ex Parte Young* entitles petitioners.

Finally, further delay in adjudicating the privilege issue is unreasonable and unfair. It should be recalled that the Communist Party has endeavored for fourteen years to secure an adjudication of its contention that the Act is at war with the constitutional privilege because, on the one hand, it subjects the Party and its members to severe criminal penalties and crippling civil disabilities as participants in a foreign-controlled conspiracy [12] and, on the other, it treats the Party like a public utility by requiring disclosure of detailed information about its affairs, including the identity of its members.[13] This fourteen year effort has been uniformly rebuffed, first as premature [14] and then on the ground that the government should be given another try at circumventing the constitutional vice inherent in the Act.[15]

This delay is the more unwarranted because the Fifth Amendment privilege to be silent, as invoked by the Communist Party and the petitioners, is intimately related to First Amendment freedoms (see *infra*, pp. 37-41).[16] The

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[12] E.g., secs. 4(a), 5, 6 and 10, and 8 U. S. C. secs. 1182, 1251, 1424, 1451 (Immigration and Nationality Act).

[13] Secs. 7 and 8.

[14] *Communist Party* v. *McGrath*, 96 F. Supp. 47, 340 U. S. 950 (1951); *Communist Party* v. *S. A. C. B.*, 351 U. S. 115 (1956); the *Communist Party* case, *supra* (1961). Cf. *American Committee for Protection of Foreign Born* v. *S. A. C. B.*, 380 U. S. 503, and *Veterans of the Abraham Lincoln Brigade* v. *S. A. C. B.*, 380 U. S. 513.

[15] *Communist Party* v. *United States*, *supra*, n. 4.

[16] "In these areas [of heresy and political crimes] the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone." Griswold, *The Fifth Amendment Today* (1955), p. 9.

result of postponing consideration of the privilege issue has been to leave in force a statute which President Truman aptly described as one which would "put the Government of the United States in the thought-control business," and "represent a clear and present danger to our institutions." Veto Message, H. R. Doc. No. 708, 81st Cong., 2d Sess., pp. 2, 5.[17] Yet, the Court only recently held that not even delicate questions of federal-state relationships would deter it from assuming jurisdiction to enjoin enforcement of a state statute when necessary to avoid "making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski* v. *Pfister*, 380 U. S. 479.

Fairness to petitioners and others who are and will be in their situation (*supra*, p. 7, n. 7), as well as a decent regard for the Constitution, demand that the privilege issue be faced up to and decided in this proceeding.

B. The Act and the orders compel self-incrimination.

The Board's orders require each petitioner to "register under and pursuant to section 8(a) and (c)" of the Act "as a member of the Communist Party of the United States of America, a Communist-action organization" as defined in the Act (R. 26, 58). Section 8 expressly requires a member of an organization found to be a Communist-action organization to register himself as "a member of such organization." In accordance with section 8, the registration form prescribed by the Attorney General (Form IS-52a) requires the registrant to declare himself to be a member of the Communist Party, as does the registration statement (Form IS-52).

Accordingly, the Act, the Board's orders and the forms and regulations of the Attorney General compel petitioners

[17] And see the dissenting opinion of Justice Black in *American Committee for Protection of Foreign Born* v. *S. A. C. B.*, *supra*, at 511.

to acknowledge that they are members of the Communist Party. Admissions of Party membership are incriminating, and may not be compelled. *Blau* v. *United States*, 340 U. S. 159; *Quinn* v. *United States*, 349 U. S. 155; *Scales* v. *United States*, 367 U. S. 203.

The holding in *Blau* was based on the Smith Act. Subsequently, the Act made it a crime to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control (sec. 4(a)). Inasmuch as the Board has found that the Communist Party operates to advance the precise objective which section 4(a) makes it unlawful to promote (*Communist Party* case, at 55), an admission of membership in the organization is highly incriminating under that section. Moreover, Communist Party membership is an element of the offenses of applying for or holding employment forbidden by section 5 of the Act, or of applying for or using a grant or loan in violation of the National Defense Education Act (20 U. S. C. 581(f)(4)). Such membership may also be an ingredient of the offense of using the mails, radio or television in violation of section 10 of the Act. An admission of membership in the Communist Party is likewise incriminating under various state laws. E.g., Texas Rev. Civil Stats., Art. 6889-3A, secs. 5 and 6. See *Stanford* v. *Texas*, 379 U. S. 476.

An admission of membership in the Communist Party may not be compelled for an additional reason. The Act subjects such members to crippling disabilities. They are ineligible for non-elective federal employment, for employment by privately owned "defense facilities," and for office or employment in labor unions (sec. 5).[18] The citizenship of naturalized citizens may be revoked if they be-

[18] Section 6, making them ineligible for passports was held unconstitutional in *Aptheker* v. *Secretary of State*, 378 U. S. 500.

came members within five years after naturalization. Alien members may not be naturalized but must be deported if within the country or excluded if outside of it.[19] Additional disabilities are imposed on members of the Communist Party by state legislation. See, e.g., *Adler* v. *Board of Education*, 342 U. S. 485.

Admissions that expose a person to imposition of these disabilities may not be compelled in the face of a claim of constitutional privilege. *Boyd* v. *United States*, 116 U. S. 616, held (at 638) that, "A witness, as well as a party, is protected by law from being compelled to give evidence that tends to incriminate him, *or to subject his property to forfeiture*" (emphasis supplied). See also at 630, 631. To the same effect, *Lees* v. *United States*, 150 U. S. 476; *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (concurring opinion). The rights which are forfeited by the Act are at least as valuable and important as property rights and should be similarly protected. *Ullmann* v. *United States*, 350 U. S. 422, 440-443 (dissenting opinion).

The registration documents call for incriminating admissions in addition to the admission of Communist Party membership.

Forms IS-52a and IS-52 both require an admission by the registrant that the Communist Party *is* (not merely was found to be) a Communist-action organization. In view of the Act's definitions (secs. 2 and 3(3)), and the Board's findings, this admission by a registrant is plainly incriminating under section 4(a) and the Smith Act.

Furthermore, the registration statement (Form IS-52) calls for all names used by the registrant in the previous ten years and for the Party offices he held in the preceding

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[19] Originally contained in secs. 22 and 25 of the Act, these sanctions are now found in secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G), and 340(c) of the Immigration and Nationality Act, 8 U. S. C. 1182, 1251, 1424, 1451.

year. This information is obviously incriminating and is demanded for no other purpose. Form IS-52 also calls for the date and place of the registrant's birth. This is identifying information, useful in efforts to link the registrant with criminal conduct. Moreover, if the registrant is an alien or naturalized person, it may be used to support efforts to deport or denaturalize him.

It is beyond dispute, therefore, that the Act and the orders of the Board requiring petitioners to register and file registration statements compel incriminating admissions. *Cf. Russell* v. *United States*, 306 F. 2d 402; *People* v. *McCormick*, 102 Calif App. 2d Supp. 954, 228 P. 2d 349.

C. Section 4(f) does not supplant the privilege.

Congress recognized that the registration requirements of the Act compel self-incrimination and sought to obviate the constitutional defect by the inclusion of section 4(f).[20] The section does not accomplish this purpose.

The first sentence of section 4(f) states that membership in a Communist organization[21] shall not "constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." This provision does not take the place of the privilege because it does not confer immunity for offenses—like the membership clause of the Smith Act—in which membership in the Communist Party is but one of several ingredients or a "link in the chain of evidence." *Blau* v. *United States*, *supra*, at 161; *Scales* v. *United States*, 367 U. S. 203.

The second sentence of section 4(f) states:

> "The fact of registration of any person under section 7 or section 8 of this title as an officer or mem-

[20] The legislative history of the section is reviewed in *Scales* v. *United States*, 367 U. S. 203, 211-19; 279-86 (dissenting opinion).

[21] Section 3(5) defines Communist organizations to include Communist-action, Communist-front and Communist-infiltrated organizations.

> ber of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

This provision does not supplant the privilege.

1. The provision merely protects against the use of a registrant's admission of membership as evidence against him in a criminal prosecution. It does not give him immunity from prosecution on account of membership. Since the protection given is not co-extensive with the privilege, it does not displace the privilege. *Counselman* v. *Hitchcock*, 142 U. S. 547.

Counselman reasoned (at 564, 586) that a statute which simply excluded the evidentiary use of a compelled incriminating admission could not supplant the privilege because it did not protect against use of the admission as a lead to other incriminating evidence. But the Court rested its decision invalidating such a statute on a broader ground. It held unequivocally (at 585-586):

> "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

It was this holding that led Congress to replace the statute which the Court invalidated with the full immunity statute which was sustained in *Brown* v. *Walker*, 161 U. S. 591. See the latter at 594 and *Hale* v. *Henkel*, 201 U. S. 43, 67. And it has been held ever since that incriminating admissions cannot be compelled by any federal authority except in exchange for absolute immunity from prosecution for offenses to which the admissions relate. *E.g.*, *Smith* v. *United States*, 337 U. S. 137, 147, 150; *United States* v. *Bryan*, 339 U. S. 323, 336; *Adams* v. *Maryland*, 347 U. S.

179, 182; *United States* v. *Monia*, 317 U. S. 424, 428; *Hale* v. *Henkel, supra*, at 67; *Brown* v. *Walker, supra*, at 594-95. And see VIII Wigmore, Evidence (McNaughton Rev.), sec. 2283.

The government suggested that section 4(f) nevertheless supplants the privilege under the circumstances of the present case. This, it is said, is because the Board proceedings "demonstrated that the Attorney General already had reason to believe that petitioner was a Party member," and hence "the mere fact of registration could not provide the Attorney General with any new leads." Brief for Respondent in Opposition with Regard to Petitioner Proctor, p. 7. Thus the argument is that a statute of the *Counselman* type is effective in ousting the privilege wherever the government is already in possession of the incriminating information the disclosure of which it seeks to compel.

This bizarre proposition seizes on the remarks in *Counselman* concerning the use of incriminating admissions as leads to other evidence of crime, but ignores the principle which the decision established. The result is a perversion of the function of immunity statutes.

The bare majority of the Court in *Brown* v. *Walker, supra*, which held that a statute conferring absolute immunity displaces the privilege was persuaded to do so (at 595, 610) by the consideration that a contrary result would permit criminals to conceal their misdoings and frustrate the enforcement of regulatory statutes.[22] But the government's proposal would be of no possible aid to law enforcement. For the proposal permits an incriminating admission to be compelled only on the condition that it is useless—*i.e.*, if it cannot be introduced in evidence and provides the prosecutor with no leads he does not already have.[23]

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[22] For a criticism of this decision, see *Ullmann* v. *United States*, 350 U. S. 422, 443-455 (dissenting opinion).

[23] The due process and First Amendment objections to such coercion are discussed *infra*, pp. 33-41.

The argument that an incriminating admission may be extorted if it is valueless is reminiscent of the discredited proposition that the admission in evidence of a coerced confession does not vitiate a conviction where other proof of guilt made use of the confession superfluous. *Jackson* v. *Denno*, 378 U. S. 368, 376; *Watts* v. *Indiana*, 338 U. S. 49, 50 n. 2. As the Court stated of the means used to secure a confession in *Haynes* v. *Washington*, 373 U. S. 503, 519:

> "The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public." [24]

Furthermore, the government's argument proves too much. For it would cover all cases in which the privilege is invoked, including those to which no statute of the *Counselman* type is applicable. This is so because such statutes are not necessary to prohibit the evidentiary use of an incriminating admission which a person has been compelled to make after claiming his privilege. "The Fifth Amendment takes care of that without a statute." *Adams* v. *Maryland*, 347 U. S. 179, 181.[25] Accordingly, if the government's proposal were accepted, claims of privilege would never be honored where the government could show

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[24] We later show that the confession of membership which the Act compels has no relation to the protection of any public interest. See *infra*, pp. 33-34.

[25] Accordingly, *Adams* v. *Maryland* holds that the only function of a statute of the *Counselman* type is to prohibit the evidentiary use against a person of an incriminating admission made by him *without* first claiming his privilege against being required to answer. Since the accused in *Counselman* had claimed his privilege (see p. 549), the statute, as applied to him, added nothing to the protection of the Fifth Amendment itself. The opinion, however, does not advert to this point.

that it was already in possession of the incriminating information that answers to its questions would disclose.

But this broad exception to the protection which the privilege affords is unwarranted by the text of the Fifth Amendment [26] and is contrary to the entire history of its application by the Court. For it has never been considered relevant to the validity of a claim of privilege that the government already had the information it sought to elicit from the witness. And it has made no difference in this respect that the privilege was claimed in a proceeding to which a *Counselman* type of statute was applicable.

In *Counselman* itself, the government must at least have suspected the witness of receiving the unlawful rebates which were the subject of the inquiry, and may well have had the proof. Similarly, in upholding claims of the privilege by witnesses before Congressional Committees who refused to answer as to their membership in the Communist Party, the Court has never suggested that former 18 U. S. C. 3486 [27] supplanted the privilege where it appeared that the committee had evidence, at the time it questioned the witnesses, of their membership in the Party. E.g., *Emspak* v. *United States*, 349 U. S. 190; *Quinn* v. *United States*, 349 U. S. 155.

In *Emspak*, for example, the committee not only had evidence that the witness was a Party member but had

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[26] Cf. *Counselman*, at 564-65: "The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' . . . It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him."

[27] Before its amendment in 1954, this section precluded the use of the testimony of a witness before a Congressional Committee as evidence against him in a criminal prosecution. See *United States* v. *Bryan*, *supra*, at 335 and *Adams* v. *Maryland*, *supra*.

published a finding to that effect. Transcript of the Record, No. 67, October Term, 1953, pp. 49-50, 242, 245, 297. Moreover, the opinion points out (at 200) that, prior to his appearance before the Committee, Emspak had been identified as a Communist in testimony given in a Smith Act prosecution of the Party leaders. The Court adverts to this fact, however, not as invalidating or weakening Emspak's claim of privilege, but to emphasize the propriety of its assertion.

Finally, the government's proposal would turn every claim of privilege into a guessing game. For the propriety of the claim would no longer depend on facts about himself which the witness knows but on how much of what he knows about himself is also known to the government.

The government argues that *Murphy* v. *Waterfront Commission*, 378 U. S. 52, has devitalized the *Counselman* rule that Congress can supplant the privilege by nothing less than an absolute grant of immunity from prosecution. Brief for Respondent in Opposition with Regard to Petitioner Proctor, p. 6. *Murphy* extended the scope of the privilege by holding (at 77) that a state may not constitutionally compel a witness to give testimony which might incriminate him under federal law. Since the states cannot confer immunity from prosecution for federal crimes, *Murphy* was required (at 79) to "accommodate" the newly established constitutional principle to the interest of the states in preserving their immunity laws as instruments for law enforcement. The need for accommodation led to the holding (*ibid*) that incriminating testimony may be compelled under a state immunity statute, but that neither the testimony nor its fruit may be used in a federal prosecution of the witness. The Court recognized (*ibid*) that this resolution of the problem created by the peculiarities of our federal system did not give a witness the full equivalent of the privilege, but left him only in "substantially the same position" as though his claim of privilege had been upheld in the absence of an immunity statute.

Nothing in the majority opinion remotely suggests a retreat from *Counselman* where no accommodation to state interests is required. Since Congress can and does grant absolute immunity from state prosecution, the problem to which *Murphy* was addressed does not arise in the case of federal immunity statutes. *Brown* v. *Walker, supra.* In this area, therefore, there is no occasion for, and no intimation in *Murphy* of, a relaxation of the rule in *Counselman* to permit incriminating testimony to be compelled on terms that give a witness only "substantially" the protection that a claim of privilege affords.[28]

Moreover, section 4(f) would not bar a claim of privilege even if the *Murphy* doctrine were extended to federal immunity statutes. For 4(f) does not prohibit use of the fruit of incriminating admissions. *Scales* v. *United States, supra,* at 210-219. Finally, the result in *Murphy* turned on weighty considerations of law enforcement while, as we have seen, the government's proposal would authorize the extortion of confessions only when they serve no such purposes.

2. The argument that section 4(f) supplants the privilege is predicated on the assumption that the section prohibits the evidentiary use of the fact of a person's registration as a Communist Party member in *any* criminal proceeding against him. The foregoing discussion has demonstrated that, granted the assumption, the argument is nevertheless fallacious. In fact, the assumption itself is erroneous.

Section 4(f) provides that the fact of a person's registration as a Party member shall not be received in evidence against him "in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section

[28] Similarly, there is no intimation in *Murphy* that a state can supplant the Fifth Amendment privilege by a statute that grants anything less than absolute immunity from state prosecution.

or for any alleged violation of any other criminal statute." By its terms, this provision is not applicable to prosecutions under sections of the Act other than 4(a) and 4(c). Hence it permits the use of an accused's registration to prove his membership in the Communist Party in prosecutions under section 15(c) for violating the employment and labeling provisions of sections 5 and 10.[29]

The legislative history of the Act confirms the interpretation of section 4(f) which a literal reading of its text requires. This history shows that the version of the Act which passed the House expressly prohibited use of the fact of the registration of the accused as a Party member in prosecutions under sections 5 and 6 of the Act. These prohibitions, however, were eliminated by the Senate. Accordingly, the failure of Congress to extend the exclusionary rule of section 4(f) to prosecutions under sections of the Act other than 4(a) and 4(c) was deliberate. The pertinent excerpts from the legislative history are set forth in Appendix B, *infra*.

The government urges that section 4(f) should not be given the limited application which a literal interpretation of its text and the legislative history demand. It argues that, "Since the purpose of Section 4(f) was to meet criticism that the Act might be unconstitutional under the Fifth Amendment, it is clear that Section 4(f) also applies to prosecutions under other provisions of the Act itself, such as those involving employment and labeling of publications." Brief for the Respondent in Opposition with Regard to Petitioner Proctor, pp. 6-7. *Scales* v. *United States, supra,* rejected a similar argument, stating (at 219):

> "To conclude that Congress' desire to protect the registration provisions of the Internal Security Act against pleas of self-incrimination should prevail

[29] Similar use of the registration of the accused was permitted by the Act in prosecutions for violating the passport ban of section 6, held unconstitutional in *Aptheker* v. *United States, supra.*

over its advertent failure to secure that result . . . would require a disregard by this Court of the evident Congressional purpose."

The ban of section 4(f) on the use of the fact of registration to prove the Party membership of a registrant is also deficient because it is confined to criminal proceedings and is inapplicable to forfeitures. Accordingly, the registration of a person as a Party member may be used against him in proceedings to denaturalize, deport or exclude him or to enforce disqualifications imposed by state legislation. And such registration (which is a matter of public record under section 9 of the Act) may, of course, be used by governmental or private employers as a basis for denying the registrant employment forbidden to Communists by section 5 of the Act or by state or local law.

3. Section 4(f) not only fails to bar the evidentiary use in *every* prosecution of a registrant of the fact of his registration as a Party member; nothing in the section bars the evidentiary use in *any* such prosecution of the other incriminating admissions called for by the registration documents.

Thus both the registration form and the registration statement (Forms IS-52a and IS-52) could be introduced in prosecutions of petitioners under section 4(a) of the Act or the Smith Act as admissions by them that the Communist Party is a Communist-action organization as defined in the Act. Likewise, the registration statements could be introduced in any criminal prosecution of petitioners to prove such possibly incriminating facts as aliases, Party offices and dates and places of birth. Finally, nothing in 4(f) prevents the government from using any of this information as leads to other evidence that might incriminate petitioners.

II.

The Act and the registration orders deny substantive due process because they serve no governmental purpose and are irrational. Moreover, they inflict punishment and constitute a bill of attainder.

The *Communist Party* case, at 88-105, sustained the constitutionality of section 7(d) of the Act, requiring a Communist-action organization to furnish the names of its members to the Attorney General. The Court held that the compulsory disclosure of the identity of the members of such an organization was a reasonable security measure.

We believe that the Court was in error for the reasons stated in the dissenting opinion of Justice Black. However that may be, the Court's justification of section 7(d) has no application to the requirement of section 8 for the self-registration of persons who are found by the Board to be members of a Communist-action organization.

The decision in the *Communist Party* case, if allowed to stand, would be relevant to a statute authorizing the Board to determine and disclose the identity of the members of a Communist-action organization which failed to file the membership list required by section 7(d). But the Act goes further. It provides that the Board shall order persons whom it finds to be members to register themselves as such, and imposes onerous criminal penalties for disobedience (secs. 13(g)(2) and 15(a)(2)). The *Communist Party* case did not consider, much less dispose of, this feature of the Act.[30]

Registration as a member of the Communist Party by a person whom the Board has found, pursuant to section 13(g)(2), to be a member serves no disclosure function. The finding itself performs this function. Self-identifica-

[30] Consideration of the member registration requirements was held (at 73 n. 22 and 79-81) to be premature.

tion of a member by registration is therefore superfluous. Hence, unlike the provision of the Act sustained in the *Communist Party* case, the member registration requirement cannot be justified as a disclosure measure. Nor does it serve any other governmental interest. Instead, it imposes cumulative penalties amounting to life imprisonment on persons who refuse obedience to a demand that the government has no business in making.

A law which punishes non-compliance with exactions having no governmental purpose is an arbitrary exertion of power prohibited by due process. "No one would deny that the infringement of constitutional rights of individuals would violate the guarantees of due process where no state interest underlies the state action." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 254. And see *Perez* v. *Brownell*, 356 U. S. 44, 58. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U. S. 516, 524. Here, no subordinating interest whatsoever can be shown.

No governmental purpose is added to the member registration procedures of the Act by section 8(c) which provides that registration "shall be accompanied by a registration statement" containing "such information as the Attorney General shall by regulation proscribe." Since the registration statement is to "accompany" registration, it need be filed only by those who register as members. Accordingly, the invalidity of the registration requirement eliminates the obligation to file a registration statement. In any event, section 8(c) could serve no legitimate governmental interest since Congress left the nature and purposes of the informational demand wholly undefined. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 254. For the same reason, the section is also invalid as an unfettered delegation of legislative power (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388) and as an authorization

of an exploratory search without judicial supervision in violation of the Fourth Amendment. *Boyd* v. *United States*, 116 U. S. 616 630; *Jones* v. *S.E.C.*, 298 U. S. 1; *Lopez* v. *United States*, 373 U. S. 427, 460 (dissenting opinion); *United States* v. *Rabinowitz*, 339 U. S. 56, 62. Finally, the only conceivable purpose of Form IS-52 is to compel a registrant to supply the Attorney General with evidence for use against him in a criminal prosecution. See *supra*, p. 32.

The member registration requirement is irrational as well as purposeless. It compels persons to register as members of a Communist-action organization who are not members at the time of registration.

This is so because section 15(a) predicates criminal liability on the failure of a person to register as a member in obedience to a final registration order, even though he is no longer a member at the time the order becomes final. A person who was a member at the time of the Board proceedings, but who has resigned or (as the government says occurred in the case of petitioner Albertson)[31] has been expelled by the time the order that he register becomes final, must nevertheless obey the order or incur the penalties of section 15(a).[32] Such a person can secure relief from the registration requirement only by first registering as a member, although he is not one, and then making application under section 13(b) for the cancellation of his registration. Thus, far from aiding disclosure of the truth, the Act compels persons to make false statements.

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[31] Memorandum for Respondent Suggesting that the Cause Is Moot with Regard to Petitioner Albertson.

[32] A considerable time may elapse between the evidentiary hearing and the date that the Board's order becomes final. In the present case, the hearings were held in September 1962 and November 1962, respectively (R. 8, 37). The latest activity relied on by the Board as evidence of Communist Party membership was in March 1962 for Proctor (R. 44-49) and in July 1962 for Albertson (R. 16-24).

The Act not only violates due process but is a bill of attainder. Since persons cannot avoid registration as members of a Communist-action organization by terminating their membership, the registration requirement is not a regulation of future membership but an inescapable punishment for past membership. Congress delegated an administrative agency—the Board—to impose this punishment. Since it is imposed without a judicial trial, the Act is a bill of attainder. *United States* v. *Brown*, — U. S. —, June 8, 1965.

The Court below did not consider whether petitioners' registration as members of the Communist Party would serve any purpose not accomplished by the findings of the Board that they were members. It avoided the inquiry, stating (R. 71) that, "we cannot now entertain constitutional objection on grounds that there is no independent governmental purpose" for the member registration requirement. The reason given for this conclusion was (*ibid*) that, "in the absence of more comprehensive interpretation of the Act, particularly regarding the sanctions",[23] than this Court gave in the *Communist Party* case, "we do not know whether an additional function is performed." This is not a comprehensible, let alone an acceptable, ground for the court's abstention. At any rate, the question which was avoided below is inescapable here. The answer requires invalidation of the member-registration requirement as arbitrary and irrational.

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[23] "Sanctions" refers to the provisions of the Act imposing civil disabilities, such as ineligibility for certain employment, upon members of Communist-action organizations.

III.

The Act and the registration orders violate the First Amendment by abridging freedom of belief, conscience and association without a governmental purpose.

The defect of the Act arising from its exaction of conduct which serves no governmental purpose is compounded by the fact that the conduct exacted is speech. The speech that is compelled consists of a declaration which is contrary to the conscience and belief of the declarant, invades his privacy and is self-defamatory. Moreover, the registration requirement restrains freedom of association for lawful political purposes. For these reasons, the Act and the Board's orders violate the First Amendment as well as due process.

A. The First Amendment not only "guards the individual's right to speak his own mind", but limits the power of public authorities "to compel him to utter what is not in his mind." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 634. At a minimum, the Amendment demands some valid governmental reason for ordering a person to make a prescribed statement or lose his liberty. As we have seen (*supra*, pp. 33-34) the member registration requirement serves no governmental purpose. Hence, the Act would violate the First Amendment even if the required declarations were innocuous.

The declaration of membership in the Communist Party which a registration order exacts is far from innocuous. It is a coerced avowal of political belief and affiliation, historically a tool of oppression, and a sign of acquiescence in the right of government to engage in this invasion of privacy. Also, because the compulsion is grounded on a governmental finding that the Communist Party is a criminal conspiracy, registration signifies acceptance of the truth of the finding and is self-dafamatory. Indeed, the registra-

tion documents (Forms IS-52a and IS-52) require the registrant to state in so many words that the Communist Party is a Communist-action organization, thereby making explicit the admission that the act of registration implies.

It is immaterial under the Act that a person found by the Board to be a Party member rejects the findings of the Act and the Board concerning the nature of Communism and the Communist Party;[34] that it is against his conscience to lend himself to a political inquisition; that he disagrees with the finding that he is a mem[illegible][35] or that his membership has terminated before regi[illegible]tion. He must register nevertheless, or lose his liberty, possibly for life, for refusing to foreswear himself by certifying as true propositions that he believes to be false.

"Of course we agree that one may not be imprisoned or executed because he holds particular beliefs." *American Communications Association* v. *Douds*, 339 U. S. 382, 400. No more may government "compel affirmation of a repugnant belief." *Sherbert* v. *Verner*, 374 U. S. 398, 402; *Torasco* v. *Watkins*, 367 U. S. 488, 495. Yet that is what the Act and the orders of the Board require of petitioners.

West Virginia Board of Education v. *Barnette, supra*, invalidated a compulsory salute to the flag which (at 633), "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." It did so despite considerations of the public interest which some of the Justices found persuasive. Here, no conceivable public interest is served by requiring petitioners to

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[34] The answers of petitioners in the administrative proceedings denied the allegations of the Attorney General's petitions that the Communist Party is a Communist-action organization (R. 5, 33).

[35] In view of the extravagant indicia of Communist Party membership contained in section 5 of the Communist Control Act (50 U. S. C. 844) and applied in *Killian* v. *United States*, 368 U. S. 231, many persons who do not believe themselves to be members can readily be found to be such.

communicate by word and sign their acceptance of the political ideas that the Act bespeaks.

The First Amendment forbids governmental compulsion on an individual to affirm the correctness of an official finding that he was a wrongdoer. For this reason, the National Labor Relations Board has been denied the authority to order employers to post notices that they will cease and desist from unfair labor practices of which they have been found guilty. *Art Metals Construction Co.* v. *N.L.R.B.*, 110 F. 2d 148; *Hartsell Mills Co.* v. *N.L.R.B.*, 111 F. 2d 291; *Kansas City P. & L. Co.* v. *N.L.R.B.*, 111 F. 2d 340; *Swift & Co.* v. *N.L.R.B.*, 106 F. 2d 87; *N.L.R.B.* v. *Louisville Refining Co.*, 102 F. 2d 678.

As Judge Learned Hand stated in the *Art Metals* case, *supra* (at 151):

> "But we think that to compel [the employer] to say that he will 'cease and desist,' necessarily imports that in the past he has been doing the things forbidden; indeed we find it hard to see how the contrary can rationally be argued. Forcibly to compel anyone to declare that the utterances of an official, whoever he may be, are true, when he protests that he does not believe them, has implications which we would hesitate to believe Congress could ever have intended . . . too long a history and too dearly bought privileges are behind such refusals."

Similarly, Judge Parker stated in the *Hartsell Mills* case *supra* (at 293):

> "We cannot imagine a court sending a convicted employer to jail for not publishing a confession that he has been guilty of violating the law, for not even a convicted felon can be required to confess his guilt."

The member registration requirements are invalid under the principle of these decisions.

B. The First Amendment prohibits restraints on membership in the Communist Party which "cut deeper into

the freedom of association than is necessary to deal with the 'substantive evils that Congress has a right to prevent.'" *Scales* v. *United States*, 367 U. S. 203, 229. And see *Aptheker* v. *Secretary of State*, 378 U. S. 500, 507-508. To compel members of the Communist Party to register as such with the Attorney General and file registration statements that are available for public inspection (sec. 9) obviously restrains their freedom of association in the organization. *Cf. Thomas* v. *Collins*, 323 U. S. 516; *Lamont* v. *Postmaster General*, — U. S. —, May 24, 1965.

The restraint is imposed without regard to the nature of the member's association. It is irrelevant under the Act that the member is innocent of wrongdoing; that he is not active in the organization, or that his activity is confined to protected political advocacy; that he does not know or believe that the organization is engaged in illicit conduct or has the characteristics ascribed to it by the Act and the Board, and that he intends through his membership only to promote social change by peaceful means. The member registration requirement, therefore, lacks the elements of knowledge, intent and activity which permitted the Court to sustain the restraint on Communist Party membership imposed by the membership clause of the Smith Act. *Scales* v. *United States*, *supra*, at 229-230. And it was the absence of these elements that invalidated the passport ban of section 6 of the Act. *Aptheker* v. *Secretary of State*, *supra*, at 509-514.

In their absence, the member registration requirement is too sweeping. It abridges the freedom of association of "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies." *Scales*, at 229. The membership of such a person bears no relation to any substantive evil within the competence of Congress, and may not be restrained. "Broad prophylactic rules in the area of free expression are suspect . . . Precision of regulation must be the touchstone in an area so closely

touching our most precious freedoms." *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 439.

Moreover, the decisions of the Court " 'have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can justify limiting First Amendment freedoms.' " *Lamont* v. *Postmaster General*, *supra* (concurring opinion), quoting from *N.A.A.C.P.* v. *Button*, *supra*, at 438. Under the Act, as we have seen, any governmental interest in the identity of the members of the Communist Party is secured by the Board's findings of membership. Since self-identification by the member is therefore superfluous, the government has no interest in requiring it. Hence, the requirement violates the First Amendment.

The court below dismissed petitioners' First Amendment argument as foreclosed by the *Communist Party* case (R. 71-72). There is no substance to this view. The *Communist Party* case applied the balancing test of the reach of the First Amendment. It held (at 88-105) that the interest of the members of a Communist-action organization in the privacy of their affiliation was outweighed by the government's security interest in removing their "mask of anonymity." We believe that the decision should be re-examined and overruled, but it does not govern this case. Here, the "mask of anonymity" has been removed by the findings of the Board. Since there is no other governmental interest that can be put in the balance on the side of the registration requirement, it cannot survive the balancing test, let alone the clear and present danger test.

IV.

The Act and the registration orders violate procedural due process and the prohibition against bills of attainder because they made the Board's 1953 determination that the Communist Party was a Communist-action organization conclusive upon petitioners as to the present character of the Party.

The answers of petitioners in the administrative proceeding denied the allegations of the Attorney General's petitions that the Communist Party is a Communist-action organization (R. 5, 33). The Attorney General offered no evidence in support of this allegation. It was his position and that of the Board that petitioners were bound by the determination which the Board made in 1953 in the proceeding against the Party (R. 13-14).

In 1962-1963, therefore, petitioners were ordered to register under the Act (R. 26, 58) on the basis of a determination, made ten years earlier in a proceeding to which they were not parties, that the Communist Party was a Communist-action organization. Yet the accuracy of this factual determination as to the character of the Party supplies the only constitutional justification that can be advanced for the registration orders against petitioners.

The Board's ruling making its 1953 determination that the Communist Party was a Communist-action organization conclusive against petitioners precluded them in two respects. They were bound by the Board's evidentiary findings in the proceeding against the Party that the Party was controlled by, and operated to advance the objectives of, the Soviet Union (sec. 3(3)). They were also bound by the Board's action in the Party proceeding identifying the Soviet Union as the foreign power, referred to in section 2, which controls a monolithic world Communist movement. In both respects, the ruling violated procedural due process and the prohibition against bills of attainder.

A. The 1953 findings with respect to the Party.

The ruling that petitioners were concluded by the Board's prior determination with respect to the control and activities of the Communist Party is required by section 8 of the Act. For that section predicates the obligation to register on membership in an organization as to which "there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization." The requirement that petitioners register is plainly invalid unless, at least, the Communist Party is a Communist-action organization. The procedure of the Act, therefore, violates the due process principle that persons may not be deprived of liberty without a hearing at which they are accorded an opportunity to contest the factual premises on which the validity of the deprivation depends. "We may assume for present purposes . . . that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152. *Noto* v. *United States*, 367 U. S. 290, 299; *Renaud* v. *Abbott*, 116 U. S. 277, 288. Cf. *Kirby* v. *United States*, 174 U. S. 47.

Congress apparently recognized that this due process requirement was applicable to the criminal prosecution of members of Communist-action organizations for violating the employment and passport prohibitions of sections 5 and 6 of the Act. For sections 5(a) and 6(a) require the government to prove not only that the organization of which the accused is a member has registered or been ordered to register, but also that it *is* "a Communist organization as defined in paragraph (5) of section 3."[36] Due process

[36] Section 3(5) defines "Communist organization" as including Communist-action, Communist-front and Communist-infiltrated organizations.

similarly requires a hearing on the character of the organization in proceedings to compel persons to register as members.[37]

This due process defect is aggravated by the fact that the determination of the Board which concluded petitioners was ten years old. In this changing world, a conclusive presumption that a state of facts, once found to exist, will continue in perpetuity is plainly arbitrary. It is therefore a principle of due process that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States* v. *Carolene Products Co., supra,* at 153; *Chastleton Corporation* v. *Sinclair,* 264 U. S. 543; *Baker* v. *Carr,* 369 U. S. 186, 214.

The rule of these decisions has peculiar pertinence to factual findings which, like the Board's, involve an evaluation of social and political ideas and phenomena. Moreover, as the Chief Justice observed in his dissent in the *Communist Party* case (at 134, n. 11), the Board's 1953 finding was itself based on a presumption of continuity which "is certainly dubious" as applied to "stale evidence" of Party activity prior to 1940.[38] And only last term, the Court remanded a proceeding under the Act to the Board because evidence taken in 1955 was held to be too stale to support a Board finding made five years later that the organization proceeded against was a Communist-front organization. *American Committee for Protection of Foreign Born* v. *S.A.C.B., supra.* See also, *Veterans of the Abraham Lincoln Brigade* v. *S.A.C.B., supra.*

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[37] A person ordered to register as a member receives no hearing on the character of the organization when prosecuted for his failure to do so. For 15(a) makes the registration order conclusive of the obligation of the accused to register. See *infra,* pp. 51-55.

[38] The majority (at 69) declined to pass on the sufficiency of this evidence.

Accordingly, even if it could be said that, because petitioners were found to be members of the Communist Party, they are bound by the 1953 determination of the Party's nature, due process would still entitle them to a hearing on the *current* character of the organization. This is denied them by the Act.

The authors of the Act recognized the possibility that a finding that an organization is a Communist-action organization might lose its validity. Section 13(b) and (i) permits an organization which has registered as a Communist-action organization to apply for a cancellation of its registration not oftener than once a year, and to secure such relief on showing that it is no longer a Communist-action organization. However, the Act does not allow an unregistered organization to seek a redetermination of its status. Nor can a member secure a redetermination of the organization's status, whether or not he or it is registered.[39]

The Communist Party has not registered under the Act and is still litigating the contention, held premature in the *Communist Party* case, that it cannot constitutionally be required to do so. See *supra*, p. 5. If it is successful in this litigation, or if it persists in refusing to register despite an adverse decision, members of the organization can never escape the effect of the Board's 1953 determination.

Section 4 of the Communist Control Act, 50 U.S.C. 843, further demonstrates that Congress intended the members of the Communist Party to be concluded in perpetuity by the finding that the Party has the characteristics of a Communist-action organization. The section provides that, "Whoever knowingly and willfully becomes or remains a

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[39] A person who has registered as a member can apply for a determination that he has ceased to be a member and secure the cancellation of his registration on that ground. See *supra*, p. 35.

member of (1) the Communist Party . . . with knowledge of the purpose or objective of such organization shall be subject to all of the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action organization.' "

The member registration requirements of the Act as here applied not only violate procedural due process but constitute a bill of attainder. *United States* v. *Brown, supra.* Unlike the statute invalidated in that case, the Act does not itself identify the Communist Party by name but delegates to an administrative agency the function of specifying the organization which satisfies the Act's definition of a Communist-action organization. The difference is immaterial, however. Now that the specification has been made by the Board and affirmed, the situation of a member is as though the Party had been named in the Act. For the requirement that he register attaches, not to his membership in an organization having described characteristics, but to his membership in a specified organization—the Communist Party—whether it fits the statutory description or not.

The majority in the *Communist Party* case recognized that the Act's requirement of registration by an organization found to be a Communist-action organization would violate due process and the prohibition against bills of attainder unless it permitted an escape from the consequences of the finding in the event of changed circumstances. The Court believed that a proceeding under section 13(b) by a registered organization for cancellation of its registration afforded the required escape.[40] Thus, the opinion stated (at 87):

> "In this proceeding the Board has found, and the Court of Appeals has sustained its conclusion, that the Communist Party, by virtue of the activities in

[40] The only dissenting Justice who reached the issue (Justice Black) believed the Act (at 146-147) to be a bill of attainder and a violation of due process.

> which it now engages, comes within the terms of the Act. If the Party should at any time choose to abandon these activities, after it is once registered pursuant to § 7, the Act provides adequate means of relief . . . §§ 13(b), (i) (j), 14(a)."

What the Court overlooked in the quoted passage was that litigation of the constitutional objections to the Act which it dismissed as premature might be prolonged and could eventuate in a decision that the Communist Party may not constitutionally be required to register. Contrary to the Court, a section 13(b) proceeding does not provide "adequate means of relief" to the Party because of changed circumstances, at least so long as the issues are in litigation. Nor, paradoxically, will it ever do so if the outcome favors the Party. We therefore believe that the Court erred in holding that section 13(b) and (i) saves the requirement of registration by organizations from condemnation as a bill of attainder and a denial of procedural due process.

Moreover, because of the piecemeal approach adopted in the *Communist Party* case to the constitutional difficulties which the Act presents, the Court did not consider the situation of a person who has been ordered to register as a member of the Party. Such a person, as we have seen, is given no "means of relief" whatsoever on the grounds that changed circumstances have invalidated the Board's 1953 finding with respect to the Party. Accordingly, the member registration requirements *do* attach "to the past and ineradicable actions of an organization" (the Communist Party), and are *not* "made to turn on continuously contemporaneous fact." *Communist Party* case, at 87. These are the earmarks of a bill of attainder.[41]

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[41] The constitutional attack on the Act on the grounds urged in this point was made but not reached in *Aptheker* v. *Secretary of State, supra* (Brief for Appellants, pp. 48-52), and *American Committee for Protection of Foreign Born* v. *S.A.C.B., supra* (Brief for Petitioner, pp. 110-11).

The Court below dismissed petitioners' contention, stating (R. 73):

> "In the absence of any showing that circumstances have changed significantly since the Board's determination of the Party's status in 1953, we do not find it necessary to reexamine the issue here."

This begs the question since the constitutional defect of the Act, as written and as applied by the Board (R. 13-14), is that it precludes petitioners from making any such showing.

B. The 1953 finding with respect to the world Communist movement.

The *Communist Party* case (at 112) affirmed the conclusion of the Board, in construing the Act, that the Soviet Union was the foreign power referred to in section 2 which controlled the monolithic world Communist movement described in that section. The Court recognized, however, that changed circumstances would require a change in this construction. It stated (at 113):

> "If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which § 2(1) and (4), fairly read in their context, refer—so that substantial domination by the Soviet Union would not bring an organization within the terms of § 3(3)—that, too, will be a matter of statutory construction which no 'findings' in the statute foreclose. The Board or a reviewing court will be able to say that the 'world Communist movement,' as Congress meant the term in 1950 (and whether or not there really existed, in 1950, a movement having all the characteristics described in § 2), no longer exists, or that Country X or Y, not the Soviet Union, now directs it."

It was only because the Court held that the Board and the courts were empowered to reconstrue section 2 in the light of contemporary fact that the Act was held (at 110-114) not to offend due process.

The eventuality foreseen by the Court when the world Communist movement as described in section 2 of the Act "no longer exists" has materialized. Whatever might have been the prevailing view concerning the findings of section 2 when Congress made them in 1950, their description of the world Communist movement is plainly anachronistic today. Statesmen and scholars alike recognize that the picture of Communism as a monolithic world movement, under iron Soviet discipline and control, and dedicated to the overthrow of all free governments by criminal and conspiratorial means, bears no resemblance to contemporary reality.

George F. Kennan has summarized current Western opinion on the subject as follows:

> "Much of the discussion in Western countries today of the problem of relations with world Communism centers around the recent disintegration of that extreme concentration of power in Moscow which characterized the Communist bloc in the immediate aftermath of the Second World War, and the emergence in its place of a plurality of independent or partially independent centers of political authority within the bloc: the growth, in other words, of what has come to be described as 'polycentrism.' There is widespread recognition that this process represents a fundamental change in the nature of world Communism as a political force on the world scene; and there is an instinctive awareness throughout Western opinion that no change of this order could fail to have important connotations for Western policy."

Polycentrism and Western Policy, Foreign Affairs, Jan. 1964, p. 172. Elsewhere in the same article, the author writes (p. 174):

> "Communism has now come to embrace so wide a spectrum of requirements and compulsions on the part of the respective parties and regimes that any determined attempt to re-impose unity on the movement would merely cause it to break violently apart at one point or another."

Senator Fullbright devoted a Senate speech entitled "Foreign Policy—Old Myths and New Realities" to the same subject (110 Cong. Rec. 6227), in the course of which he said (p. 6228):

> "The master myth of the cold war is that the Communist block is a monolith composed of governments which are not really governments at all but organized conspiracies, divided among themselves perhaps in certain matters of tactics, but all equally resolute and implacable in their determination to destroy the free world."

In similar vein, Vice President (then Senator) Humphrey, in an article for the North American Newspaper Alliance, has written that, "The 'monolithic unity' of the Communist bloc is an archaic myth to which no one even bothers to pay lip service any more." Washington Evening Star, Sept. 3, 1964. And Secretary of State Rusk, speaking before the IUE-AFL-CIO, declared that, "The Communist world is no longer a single flock of sheep blindly following behind one leader." Congressional Quarterly, Mar. 6, 1964, p. 479.[42]

The Board's ruling that its 1953 construction of the Act is conclusive on petitioners foreclosed consideration of this mass of evidence that, " 'the world Communist movement,' as Congress meant the term in 1950 . . . has ceased to exist"

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[42] Arnold J. Toynbee recently wrote that "the monolithic solidarity of world Communism is an exploded myth." We Must Woo Red China, Saturday Evening Post, July 17, 1965, p. 10. For other expressions of similar views see, e.g.: East-West Trade, A Compilation of Views of Businessmen, Bankers, and Academic Experts, Senate Committee on Foreign Relations, 1964, pp. 220, 245, 273, 278, 284; East-West Trade, Hearings before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess., Part II, Feb. 24, 25 and 26, 1965, pp. 26-31, 60-62, 166-69, 243-44, 248-50; Report to the President of the Special Commiteee on U. S. Trade Relations with Eastern European Countries and the Soviet Union, U. S. Govt. Printing Office, 1965, pp. 1-2.

(*Communist Party* case at 113). If the Board's ruling is correct, the Act violates due process and is a bill of attainder. On the other hand, if the Board was wrong, the Court must reconsider the 1953 construction of section 2 in the light of present day reality.

V.

The Act unconstitutionally denies petitioners the safeguards of grand jury indictment, judicial trial and trial by jury.

Sections 7 and 15 of the Act make it a crime for a person to disobey a final order of the Board that he register as a member of an organization which it has found to be a Communist-action organization. Thus, under the scheme of the Act, the issues as to the character of the organization and the accused's membership in it are not submitted to the grand jury that returns the indictment or to the judge or petit jury that try it. Instead, the Board's determinations are conclusive for the purposes of the criminal proceeding. Moreover, the Board bases its determinations on a preponderance of the evidence and not on proof beyond a reasonable doubt (sec. 14(a)).

Accordingly, if the orders against petitioners become final, the only issue of fact in prosecutions for non-compliance will be whether petitioners have registered.

The punishment of petitioners for failing to register is without any possible justification unless they are in fact members of the Communist Party and unless the Party is in fact a Communist-action organization. Yet the Act denies petitioners the constitutional safeguards for the determination of these factual issues. It accomplishes this by framing the crime of non-registration in terms that embody the administrative determination of two of the factual issues on which criminal liabiilty depends, thus

excluding them from consideration in the criminal proceeding. By so doing, the Act violates the guarantee of indictment by grand jury, judicial trial and trial by jury contained in the Fifth and Sixth Amendments, Art. III, sec. 2, cl. 3, Art. III, sec. 1, and Art. I, sec. 9, cl. 3. *Wong Wing* v. *United States*, 163 U. S. 228; Fraenkel, Can the Administrative Process Evade the Sixth Amendment, 1 Syracuse L. Rev. 173. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165-67.

Wong Wing invalidated a statute which authorized the imprisonment of Chinese aliens who were found by a United States judge or commissioner to be in the country unlawfully. The Court held that the statute violated the Fifth and Sixth Amendments by authorizing infamous punishment without indictment by grand jury and trial by judge and petit jury. It recognized that aliens could be deported on administrative determinations of their illegal presence, but it decided that they could not be punished for the same cause without observance of the constitutional safeguards governing criminal cases.

The Act differs from the statute in *Wong Wing* in that it accords petitioners the constitutional safeguards with respect to one element of the offense, their failure to file the required registration documents. But it denies these safeguards with respect to the other two elements, the character of the Communist Party and petitioners' membership in it. The principle of *Wong Wing*, however, and the plain meaning of the Constitution make the safeguards applicable to *every* element of the offense. The result in *Wong Wing* would have been the same if the statute had provided for an administrative determination of the illegality of the alien's entry and had accorded him a jury trial limited to the issue of his presence in the country.

Such was virtually the situation that was presented in *United States* v. *Spector*, 343 U. S. 169. There, a statute

made it a crime for aliens under administrative deportation orders to fail to depart the country or to take steps to effect their departure. Under the statute, therefore, the issue of the deportability of the accused was determined administratively and not at the criminal trial. The majority of the Court did not consider whether this feature of the statute invalidated it, holding (at 172) that the question had not been raised.

Justice Jackson, joined by Justice Frankfurter, dissented on the ground that the question was properly before the Court and that the statute unconstitutionally denied an accused a judicial and jury trial on the issue of his deportability.[43] After reviewing the decision in *Wong Wing*, the opinion proceeds (at 177-78):

> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. . . . If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the same manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The Act, like the self-deportation statute, subdivides the crime which it creates and submits "the vital and controversial part" of the charge—the nature of the organization and the membership in it of the accused—to conclusive adminstrative determination. The Act is unconstitutional for that reason.

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[43] Justice Black, dissenting on other grounds, added of Justice Jackson's dissent (at 174, n. 1) that, "I have not seen seen a satisfactory reason for rejecting his view."

A statute may, of course, impose criminal penalties for violations of administrative rules or regulations, and provide that their validity may be challenged only in administrative or civil proceedings. *Yakus* v. *United States*, 321 U. S. 414. These principles, however, apply only to administrative rule-making, not to administrative adjudications of the acts of individuals. Justice Jackson pointed out this distinction in *Spector*, at 179.

Justice Jackson's opinion in *Spector* is not contrary to the decision in *Cox* v. *United States*, 332 U. S. 442, that the accused in a prosecution for violation of the Selective Service Act is concluded by the draft board's denial of an exempt classification. A draft exemption is the grant of an exceptional privilege excusing an individual from an obligation that is generally applicable to all males in his age group. Moreover, the Selective Service Act is an exercise of the war power. No exemptions are constitutionally required, and hence they may be withheld on the government's own terms,[44] one of which may be that an administrative decision denying an exemption shall be conclusive on the draftee in a prosecution for draft evasion. Cf. *United States* v. *Nugent*, 346 U. S. 1.

The case is different with a statute which is not of general application, does not grant a privilege but exacts an obligation, does not represent an exercise of the war power, and whose constitutionality in each case depends on the presence of certain facts. This was the situation in *Spector* where the accused could not constitutionally be required to depart the country unless his presence here was unlawful. In such a case, an administrative finding of the constitutionally prerequisite facts cannot conclude the accused in a prosecution for violation of the requirement. It was because this distinction is obvious that Justices Jackson and

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[44] Provided that they do not arbitrarily discriminate, e.g., by exempting clergymen of certain denominations but not of others.

Frankfurter, who voted with the majority in *Cox*, saw no necessity for referring to it in *Spector*.[45]

Petitioners' case is on all fours with *Spector*. For prerequisite to the constitutionality of the orders that petitioners register as members of the Communist Party are (1) that they are members and (2) that the Communist Party is a Communist-action organization. See the *Communist Party* case, at 104-05. Accordingly, Board determinations of these facts may not be made conclusive on petitioners in prosecutions for violating the registration orders.

The court below held (R. 69-70, n. 6) that consideration of this objection to the Act must be deferred until petitioners are prosecuted for non-compliance with the Board's orders. But under *Ex Parte Young, supra*, petitioners may not be required to incur the enormous criminal penalties of section 15(a) as the price of an adjudication of their constitutional contentions, but are entitled to litigate them in a civil proceeding. Since this proceeding provides the remedy to which petitioners are entitled, their constitutional challenge is not premature. See *supra*, p. 19.[46]

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[45] Nor did Justice Black, who agreed with the majority in *Cox* (at 455) that the accused was not entitled to a jury trial on the issue of his exemption, and also expressed his concurrence with Justice Jackson's opinion in *Spector* (at 174, n. 1).

[46] The petitioner in the *Communist Party* case argued that the Act and the order requiring it to register were unconstitutional under *Wong Wing* and Justice Jackson's opinion in *Spector*. See Brief for Petitioner, pp. 72-74. The majority (at 81) dismissed the argument as premature without consideration of the rule of *Ex Parte Young*. But see the dissent of Justice Black, at 145-46. The Communist Party renewed this constitutional attack in the prosecution for violating the order that it register. The Court of Appeals did not consider the issue but reversed the conviction on other grounds. See Brief for Respondent in Opposition in *United States* v. *Communist Party*, No. 1027, Oct. Term, 1963, pp. 1-2, 14, 16. See also *supra*, p. 5, n. 4.

CONCLUSION

The judgment below should be reversed with directions to set aside the orders of the Board.

Respectfully submitted,

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Appendix A—Statutes and Regulations Involved

1. Subversive Activities Control Act

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

SEC. 2 [781] * As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

> (1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.
>
> • • •
>
> (4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.
>
> (5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.
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* Numbers in brackets are the section numbers of 50 U. S. C.

SEC. 3. [782] For the purposes of this title—

• • •

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title;

• • •

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

• • •

SEC. 4. [783] (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

• • •

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or sec-

tion 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

* * *

SEC. 7. [786] (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

* * *

(c) The registration required by subsection (a) or (b) shall be made—

* * *

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

* * *

(4) In the case of a Communist-action organization, the name and last known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

* * *

SEC. 8. [487] (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organiza-

tion to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsections (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

* * *

SEC. 13 [792](a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall

be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this tile, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

* * *

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

* * *

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(i) If after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

* * *

SEC. 14. [793] (a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the

proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

* * *

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

SEC. 15. [794] (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this Title—

* * *

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

2. Regulations of the Attorney General

Order No. 250-61, issued by the Attorney General, on October 3, 1961, effective October 7, 1961, prescribing regu-

lations to carry out the provisions of sections 7, 8, 9 and 10 of the Subversive Activities Control Act, 28 C. F. R. Part 11, provides in pertinent part as follows:

Section 11.206 *Forms for registration of individuals.*

Each individual required to register pursuant to section 8(a) or (b) of the act shall accomplish such registration on a form hereby designated as Form IS-52a. This form is available at the Internal Security Division, Department of Justice, Washington 25, D. C., and may be obtained in person or by mail.

Section 11.207 *Form for registration statement of individuals.*

Registration statements of individuals shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D. C. Filing may be made in person or by mail and shall be deemed to have taken place upon receipt thereof. Such registration statement shall be on a form hereby designated as Form IS-52, copies of which are available at the Internal Security Division.

3. Forms Prescribed by the Attorney General

Form IS-52a is as follows:

Form No. IS-52a
(Ed. 9-6-61)

Budget Bureau No. 43-R414
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

REGISTRATION FORM FOR INDIVIDUALS

Pursuant to Section 8(a) or (b) of
the Internal Security Act of 1950

(NOTE: This form should be accompanied by a Registration Statement, Form IS-52)

..... hereby
(Name of individual—Print or type)
registers as a member of .....,
a Communist-action organization.

/s/ .....
(Signature) (Date)

.....
(Typed or printed name) (Date)

.....
(Address—type or print)

Form IS-52 is as follows:

Budget Bureau No. 43-R301.2
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

FORM IS-52

for

REGISTRATION STATEMENTS OF INDIVIDUALS
Pursuant to section 8 of the Internal
Security Act of 1950

INSTRUCTION SHEET—READ CAREFULLY

1. All individuals required to register under section 8 of the Internal Security Act of 1950 shall use this form for their registration statements.

2. Two copies of the statement are to be filed. An additional copy of the statement should be prepared and retained by the Registrant for future references.

3. The statement is to be filed with the Internal Security Division, Department of Justice, Washington, D. C.

4. All items of the form are to be answered. Where the answer to an item is "None" or "inapplicable," it should be so stated.

5. Both copies of the statement are to be signed. The making of any willful false statement or the omission of any material fact is punishable under 18 U. S. Code, 1001.

6. If the space provided on the form for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and item shall be restated and the answer given.

FOR AN INDIVIDUAL

a. Who is a member of any Communist-action organization which has failed to file a registration statement as required by Section 7(a) of the Internal Security Act of 1950.

OR

b. Who is a member of any organization which has registered as a Communist-action organization under Section 7(a) of the Internal Security Act of 1950 but which has failed to include the individual's name upon the list of members filed with the Attorney General.

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1. Name of the Communist-action organization of which Registrant was a member within the preceding twelve months.

2.(a) Name of Registrant.

(b) All other names used by Registrant during the past ten years and dates when used.

(c) Date of birth.

(d) Place of birth.

3.(a) Present business address.

(b) Present residence address.

4. If the Registrant is now or has within the past twelve months been an officer of the Communist-action organization listed in response to question number 1:

(a) List all offices so held and the date when held.

(b) Give a description of the duties or functions performed during tenure of office.

The undersigned certifies that he has read the information set forth in this statement, that he is familiar with the contents thereof, and that such contents are in their entirety true and accurate to the best of his knowledge and belief. The undersigned further represents that he is familiar with the provisions of Section 1001, Title 18, U. S. Code (printed at the bottom of this form).*

/s/ .....
(Signature) (Date)

/t/ .....
(Name) (date)
(Print or type)

* 18 U. S. C., Section 1001, provides: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Appendix B—Legislative History Relating to the Scope of Section 4(f) of the Act

The House version of the Act was H. R. 9490, 81st Cong., 2d Sess. Section 4(e) of this Bill, as it passed the House, contained the substance of what became section 4(f) of the Act. It provided:

> "(e) The fact of the registration of any person under section 7 or section 8 of this Act as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (b) of this section * or for any alleged violation of any other criminal statute."

Sections 5 and 6 of the House Bill likewise restricted the evidentiary use of the fact of registration in prosecutions for violations of the employment and passport prohibitions of these sections. Section 5(f) of the Bill provided:

> "(f) The fact of the registration of any person under section 7 or section 8 of this Act as an officer or a member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsections (a) and (c) of this section." **

Section 6(b) of the Bill provided:

> "(b) The fact of the registration of any person under section 7 or section 8 of this Act, as an officer

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* Section 4(f) of the Act refers to "subsection (a) or subsection (c) of this section." Sec. 4(b) of the House Bill contained the substance of what became section 4(c) of the Act. The Bill contained no provision paralleling section 4(a) of the Act.

** Section 5(a) and (c) of the House Bill contained the substance of what appears as section 5(a) of the Act.

> or a member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) of this section." *

It is clear from the inclusion of sections 5(f) and 6(b) in the House Bill that the House intended the words "any other criminal statute," as used in section 4(e), to be given a literal interpretation and to exclude offenses created by the Bill itself. Otherwise, sections 5(f) and 6(b) would have been superfluous.

The Senate version of the Act was based on S. 2311, 81st Cong., 1st Sess. As introduced, it contained no restriction on the evidentiary use of the fact of registration. But as amended in committee and passed by the Senate, the bill included a section 4(f), which provided as follows: **

> "The fact of the registration of any person under section 7 or section 8 of this Act as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section." ***

The Senate Bill, however, contained no restrictions on the evidentiary use of the fact of registration in prosecutions for violations of sections 5 and 6.

The legislation as reported out by the conference committee and enacted eliminated the provisions of sections

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* Section 6(a) of the House Bill was identical with section 6(a) of the Act.

** The Committee amendment appears in S. Rep. No. 1358, 81st Cong., 2d Sess., to accompany S. 2311, p. 2.

*** Subsections 4(a) and 4(c) of the Senate Bill contained the substance of the provisions of these subsections as they appear in the Act.

5(f) and 6(b) of the House Bill.* It added to the Senate version of the second sentence of section 4(f) the words, "or for any alleged violation of any other criminal statute," which were taken from section 4(e) of the House Bill. As we have seen, however, these words were never intended to be applicable to violations of sections 5 or 6.

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* The Conference Report is H. R. Rep. No. 3112, 81st Cong., 2d Sess., to accompany H. R. 9490.